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In The
Supreme Court of the United States
October Term, 1994

CARMEN G. SALAZAR,
Petitioner,
vs.
THE PRICE COMPANY AND
DAYMON ASSOCIATES, INC.,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

The sole question presented as respects Respondent The Price Company is, as follows:

1. Did the Court of Appeals properly dismiss Petitioner's appeal from the District Court's memorandum opinion and order denying Plaintiff's motion for a default judgment because the District Court's order was non-final and, accordingly, the Court of Appeals lacked jurisdiction?

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OPINIONS BELOW

The Order of the Court of Appeals dismissing the appeal is attached to the Petition as Appendix A. The Memorandum Opinion and Order of the District Court entered on October 12, 1994 denying Petitioner's motion for a default judgment is attached to the Petition as Appendix G. The Final Judgment of the

District Court entered on December 21, 1994 granting Respondent The Price Company's motion to dismiss and dismissing Petitioner's claims against Respondent Daymon Associates, Inc. for failure to conduct service of process is attached to the Petition as Appendix F.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate, incomplete and replete with immaterial points.

Petitioner commenced this action on July 1, 1994. Respondent The Price Company filed its Answer on July 27, 1994. Appendix G to the Petition, page 2. The Petitioner nevertheless filed a Motion For Default and Judgment against both respondents on August 16, 1994. The District Court entered its Memorandum Opinion and Order on October 12, 1994, denying the motion. As respects Respondent The Price Company, the District Court found that The Price Company filed its Answer on July 27, 1994 and that "there is not even a colorable basis for arguing that a default judgment should be entered against The Price Company." Appendix G to the Petition, page 2. As respects Respondent Daymon Associates, Inc. ("Daymon") the District Court found that service of process had never been accomplished and directed Petitioner to serve Daymon's counsel on or before October 20, 1994. The effect of the District Court's order was merely to deny the motion for default judgment. There was no disposition of any of the claims in the Complaint against the two respondents.

Instead of serving Daymon as directed by the District Court, Petitioner filed a notice of appeal from the October 12, 1994

Memorandum Opinion and Order on October 20, 1994. Appendix "1" attached hereto. On November 14, 1994, the Court of Appeals raised the issue of whether the order being appealed from was a final, appealable order, and directed the parties to brief the jurisdictional issue. Appendix E to the Petition. The District Court entered a Final Judgment on December 21, 1994, granting Respondent The Price Company's motion to dismiss or, in the alternative, motion for summary judgment. Appendix F to the Petition. The Final Judgment resolved all claims against all parties. The Petitioner filed no notice of appeal from the Final Judgment. On March 30, 1995, the Court of Appeals determined that the Petitioner's appeal from the District Court's denial of her motion for a default judgment was jurisdictionally defective because the order appealed was not a final, appealable order. Appendix A to the Petition.

Contrary to Petitioner's characterization of the case, this is not a case of "conspiracies" among the Equal Employment Opportunity Commission, District Court and Court of Appeals and the respondents to violate Petitioner's constitutional rights. Nor is it a case of "undue influence" or "judicial decision-making" by the respondents. This is simply a case where the Petitioner refused to comply with the District Court's order to serve Daymon, instead filed a premature appeal, then failed to file a timely appeal when a final judgment was entered, despite being alerted to the jurisdictional defect by the Court of Appeals.

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REASONS FOR DENYING THE PETITION

I. The Petition Fails To Involve Any of the Considerations Governing Review Under Sup. Ct. R. 10.1

The considerations governing review on writ of certiorari are set forth in Sup. Ct. R. 10.1, and do not include the circumstances involved in this case. While Petitioner alleges that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings in sanctioning a lower court's decision as to call for an exercise of this Court's power of supervision," even a cursory review of the opinions below demonstrates that this is a baseless contention.

II. The District Court's Order Denying The Petitioner's Motion for Default Judgment Was Not An Appealable Order.

The Court of Appeals has jurisdiction over "all final decisions of the district courts" pursuant to 28 U.S.C. §1291. Denials of motions for default judgment are not final appealable orders. ***Bird v. Reese,*** 875 F.2d 256 (9th Cir. 1989). Such denials do not terminate the litigation on the merits but rather leave the litigation in place. ***McNutt v. Cardox Corporation,*** 329 F.2d 107, 109 (6th Cir. 1964). Since there was no final decision, Petitioner's appeal was premature and was required to be dismissed.

Petitioner argued that the District Court's order was appealable under the "collateral order" exception to the final judgment requirement. See ***Cohen v. Beneficial Industrial Loan Corporation,*** 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The Court of Appeals considered this contention and determined that no exception applied. Appendix A to the Petition. This

exception applies to "claims of right separable from, and collateral to, rights asserted in the action." ***Cohen***, 337 U.S. at 546. The decision appealed from must not be of a "nature as to affect, or be affected by, decision of the merits." ***Id.***

In ***Desktop Direct, Inc. v. Digital Equipment Corp,*** 993 F.2d 755 (10th Cir. 1993), the Court reviewed the requirements which must be satisfied in order for the "collateral order" exception to apply. 993 F.2d at 757. These are that: 1) it must conclusively determine the disputed questions; 2) it must resolve any important issue completely separate from the merits of the action, and 3) it must be effectively unreviewable on appeal from a final judgment. The District Court's Order did not conclusively determine any of the disputed questions regarding Petitioner's claim of employment discrimination. More importantly, however, the denial of the motion for a default judgment could be effectively reviewed on appeal from a final judgment. Thus, this case did not meet the ***Cohen*** exception requirements.

III. Fed. R. App. P. 4(a)(2) Does Not Permit a Notice of Appeal from an Interlocutory Decision to Serve as a Notice of Appeal from a Final Judgment

Rule 4(a)(2) of the Federal Rules of Appellate Procedure provides:

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(Emphasis added)

Petitioner contends that the Court of Appeals departed from accepted and usual judicial proceedings in determining that her October 20, 1994 notice of appeal from the District Court's Memorandum Opinion and Order entered on October 12, 1994 did not operate pursuant to Rule 4(a)(2) as a notice of appeal from the Court's December 21, 1994 Final Judgment. Contrary to Petitioner's contention, the Court of Appeals correctly applied the law established in this Court's prior decisions. First, Petitioner's notice of appeal specifically stated that it was from "the order and opinion for the Motion for Default and Judgment, entered in this action on the 12th day of October, 1994." See, Appendix '1', Petitioner never filed a notice of appeal from the December 21, 1994 Final Judgment. Moreover, Rule 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. Rule 4(a)(2) does not permit a notice of appeal from a clearly interlocutory decision--such as the District Court's denial of Petitioner's motion for default judgment--to serve as a notice of appeal from the final judgment. The United States Supreme Court's decision in ***FirsTier Mortgage v. Investors Insurance Company***, 498 U.S. 269 (1991), is on point. In that case, this Court first noted that Rule 4(a)(2) refers to a notice of appeal filed after the announcement of a decision designated in the notice of appeal. 498 U.S. 275, fn. 4. Here, Petitioner's notice of appeal only refers to the October 12, 1994 order denying her motion for default judgment. Hence, it cannot operate under Rule 4(a)(2) as a notice of appeal from the December 21, 1994 Final Judgment which granted Respondent's Motion to Dismiss or for Summary Judgment. Secondly, Rule 4(a)(2), on its face, only applies to a notice of appeal filed after a decision is announced by

the district court but before the entry of the order on the decision. Here, Petitioner filed a notice of appeal from the October 12, 1994 order denying her motion for default judgment. She did not file a notice of appeal after the announcement by the District Court of a decision on Respondent's motion to dismiss or for summary judgment, which is the subject of the December 21, 1994 Final Judgment. "Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal after the announcement of judgment but before the entry of the order." ***General Television Arts, Inc. v. Southern Railway Company,*** 725 F.2d 1327 (11th Cir. 1984) (Emphasis in original). The Court in ***General Television*** further held that "a final judgment does not retroactively validate [a] premature notice of appeal." ***Id.***

Thirdly, this Court in ***FirsTier Mortgage*** made it clear that Rule 4(a)(2) does not permit notices of appeal from clearly interlocutory decisions to serve as notices of appeal from a later final judgment. As stated by the Court:

> . . .Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.
>
> This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision--such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure--to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a

> non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment.

498 U.S. at 276. (Emphasis added.)

The October 12, 1994 Memorandum Opinion and Order merely denied Petitioner's motion for default judgment. As such, it was not a final judgment as to any of the claims or any of the parties, and it was clearly an interlocutory decision. ***See, Bird v. Reese***, 875 F.2d 256 (9th Cir. 1989); ***McNutt v. Cardox,*** 327 F.2d 107, 109 (6th Cir. 1964) (orders denying motions for default judgment are non-final, non-appealable, interlocutory orders). Moreover, the Court of Appeals clearly alerted Petitioner to the fact that her October 20, 1994 notice of appeal suffered from a jurisdictional defect because there was no final judgment. See, Appendix E to the Petition. Despite such notice, Petitioner filed no notice of appeal from the December 21, 1994 final judgment. Pursuant to the Supreme Court's holding in ***FirsTier Mortgage,*** the October 20, 1994 notice of appeal could not serve as a notice of appeal from the December 21, 1994 final judgment, and the Court of Appeals properly determined that it had no jurisdiction. 498 U.S. at 276.

IV. The Final Judgment Entered On December 21, 1994 Did Not Render the Jurisdictional Defect Relating to Petitioner's Notice of Appeal Moot

As discussed above, the notice of appeal filed on October 20, 1994 cannot serve as a notice of appeal from the District Court's Final Judgment entered on December 21, 1994, and the Court of

Appeals was without jurisdiction to consider whether the December 21, 1994 decision was proper. The Court of Appeals was also asked to consider if it had jurisdiction to hear the appeal from the district court's October 12, 1994 memorandum opinion and order in light of the subsequent entering of a final judgment. Petitioner argued that the jurisdictional issue was moot. However, there is again on-point authority holding to the contrary.

In ***Strasburg v. State Bar of Wisconsin,*** 1 F.3d 468 (7th Cir. 1993), an appeal was taken from the district court's order which granted summary judgment as to one defendant, but which dismissed without prejudice the claims against several other defendants because they were not served with process within 120 days of the filing of the complaint, and which allowed the plaintiffs thirty days to refile and accomplish service. The district court stated that if the plaintiffs did not accomplish service, the dismissal of the complaint would be amended to be with prejudice, and final judgment would be entered in favor of all the defendants. The plaintiffs did not serve the remaining defendants but instead filed several motions and a notice of appeal. The district court subsequently denied all the motions and dismissed the action with prejudice, directing the clerk to enter final judgment. 1 F.3rd at 469-470.[1]

Under circumstances indistinguishable from this case, the Court in ***Strasburg*** held first that the announced decision referenced in Rule 4(a)(2) must bear "some close relation to the final judgment, or else litigants would save themselves the trouble

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[1] Similarly, in this case, the October 12, 1994 Memorandum Opinion and Order denied Petitioner's motion for default judgment and directed the Petitioner to serve Daymon Associates by October 20, 1994. Instead of doing what the District Court directed, Petitioner filed a notice of appeal on October 20, 1994. Two months later, the District Court granted Respondent The Price Company's motion to dismiss or for summary judgment, dismissed the claims against Daymon Associates for failure to accomplish service of process, and directed the entry of final judgment.

of determining which document is the final judgment, and simply appeal the first decision handed down on any matter by the district court." 1 F.3d at 471. The Court then held that "patently interlocutory decisions, such as discovery rulings or sanction orders, do not merit the saving provisions of Rule 4(a)(2)." 1 F.3d at 472, citing ***FirsTier,*** 498 U.S. at 276. As stated by the Court: "[T]he central question is whether the district court has announced a decision purporting to dispose of all of the litigant's claims." Id. The Court in ***Strasburg*** determined that the district court's decision, which on its face conditioned the final disposition of the suit and invited the plaintiffs to refile and accomplish service on the defendants within thirty days, could not reasonably have been understood as a final order. Accordingly, the Court in ***Strasburg*** held that the notice of appeal was premature, did not relate forward to the date of entry of the final judgment, and did not confer jurisdiction on the appellate court.

The circumstances in this case are even more compelling than those in ***Strasburg***. Here, the District Court's October 12, 1994 order merely denied Petitioner's motion for a default judgment. Unlike ***Strasburg***, no claims were dismissed and nothing needed to be refiled. Just as in ***Strasburg***, the District Court here directed the Petitioner to serve one of the defendants. It could not have been clearer that Petitioner's claims against both defendants remained to be determined, and that further action would be taken by the District Court. Just as in ***Strasburg***, the Petitioner's notice of appeal was premature, it could not relate forward to the entry of the Final Judgment on December 21, 1994, and the appeal was required to be dismissed for want of jurisdiction.

CONCLUSION

For the reasons stated above, Respondent The Price Company submits that the Petition presents no issue which is appropriate for the issuance of a Writ of Certiorari. Accordingly, Respondent requests that the Court deny the Petition.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By_____

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APPENDIX

CV94-753-JGB

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Carmen G. Salazar, Plaintiff

vs.

Daymon Associates, Inc.

and

The Price Company, Defendants

NOTICE OF APPEAL

Notice is hereby given that Carmen G. Salazar, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order and opinion for the Motion for Default and Judgment, entered in this action on the 12th day of October, 1994.

Carmen G. Salazar, Plaintiff
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